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16 UNITED STATES OF AMERICA

17 UNITED STATES DISTRICT COURT

18 FOR THE CENTRAL DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA,

20 No. CR 2:23-00023-FMO

21 Plaintiff,

22 GOVERNMENT'S SENTENCING POSITION
23 REGARDING DEFENDANT NICOLE
24 KALAMAOKEOLA GUIU

25 v.

26 NICOLE KALAMAOKEOLA GUIU,

27 Hearing Date: January 25, 2024

28 Defendant.

29 Hearing Time: 4:00 p.m.

30 Location: Courtroom of the
31 Hon. Fernando M.
32 Olguin

33 Plaintiff United States of America, by and through its counsel
34 of record, the United States Attorney for the Central District of
35 California and Assistant United States Attorney Roger A. Hsieh,
36 hereby files its sentencing position with respect to defendant NICOLE
37 KALAMAOKEOLA GUIU.

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This sentencing position is based upon the attached memorandum of points and authorities, the Presentence Investigation Report, the under-seal victim-impact statement and exhibits, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: January 8, 2024

Respectfully submitted,

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/s/

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

While on probation for felony embezzlement, defendant NICOLE KALAMAOKELOA GUIU abused her position of trust as Assistant General Manager of a global hotel chain (the "Victim Hotel") and embezzled more than \$440,000 in a sophisticated scheme that lasted about eight years. After she was confronted by the Victim Hotel, defendant tried to cover her tracks by wiping and reformatting her laptops and cell phone before returning them to the Victim Hotel.

Defendant pleaded guilty to bank fraud in violation of 18 U.S.C. § 1344(2) as charged in an Information, an offense that makes her ineligible for probation. (Dkt. 1.) Defendant did not enter into a plea agreement, but she admitted the factual basis in the parties' Joint Rule 11 Statement. (Dkt. 3.)

In the United States Pretrial and Probation Office's ("USPO") Presentence Investigation Report ("PSR"), it determined that: (1) defendant's adjusted offense level is 23; (2) defendant's criminal history category is II; and (3) the applicable sentencing guidelines range is 37 to 46 months, two to five years' supervised release, and a fine from \$15,000 to \$1,00,000. (Dkt. 32.) The USPO also filed a disclosed recommendation letter in which it recommended that the Court sentence defendant to 30 months' imprisonment, three years' supervised release, and a \$100 special assessment. (Dkt. 31.)

The government concurs with the USPO's calculation of defendant's offense level and understands that with the November 1, 2023, amendments to the U.S. Sentencing Guidelines ("USSG"), defendant may have a Criminal History Category of I and a guidelines range of 33 to 41 months' imprisonment. For the reasons outlined

1 below, the government submits that a total sentence of 36 months'
2 imprisonment, 3 years' supervised release, a \$100 special assessment,
3 and an order requiring defendant to pay \$440,502.31 in restitution,
4 is sufficient, but not greater than necessary, to achieve the goals
5 of sentencing set forth in 18 U.S.C. § 3553(a).

6 **II. FACTUAL BACKGROUND**

7 In 2006, defendant was convicted of four felony counts of
8 embezzlement and served just one month of a 10-year sentence. (PSR
9 ¶ 42.) She was placed on probation through July 22, 2013. (Id.)

10 While on probation for her felony embezzlement convictions,
11 defendant began a bank fraud scheme as Assistant General Manager for
12 the Victim Hotel from at least December 2009 through June 2017. (PSR
13 ¶ 8.) As Assistant General Manager for the Victim Hotel, defendant
14 was entrusted with significant trust and autonomy. For example,
15 defendant: (1) managed staff accountants and they reported to her;
16 (2) was a Human Resources Manager and had oversight of payroll and
17 accounting; (3) was one of only two people with heightened security
18 to create an employee's user profile; (4) managed night shift
19 auditors; and (5) could process refunds to a customer's credit or
20 debit card for thousands of dollars through a computer without any
21 audit. (PSR ¶¶ 9-11; GUIU_00449-50.)

22 For about eight years, defendant provided unauthorized refunds
23 from the Victim Hotel to debit cards, and ultimately bank accounts,
24 that defendant controlled. Defendant made well over 100 unauthorized
25 refunds from the Victim Hotel to her bank accounts totaling at least
26 approximately \$440,502.31. (GUIU_001-09.) The General Manager
27 calculates that defendant embezzled more than \$641,000 from the
28 Victim Hotel. (Victim-Impact Statement.)

1 Defendant's position as Assistant General manager allowed her to
2 conceal her embezzlement scheme in multiple ways:

3 First, defendant created a secondary login for another employee
4 using defendant's unique security as an Assistant General Manager.
5 Defendant would then use this employee's secondary login without
6 authorization to issue the fraudulent refunds. (PSR ¶ 11.)

7 Second, the Victim Hotel used a system that created a batch
8 report containing the Victim Hotel's financial activity from the
9 previous day, including refunds provided to customers. The batch
10 report was submitted to the General Manager. (GUIU_00443-44.)

11 To conceal her fraud scheme, defendant required staff to provide
12 the hard copy batch report directly to defendant and not to the
13 General Manager. Defendant had managerial authority over these staff
14 members and could direct them to give her the reports directly. For
15 batch reports reflecting defendant's unauthorized refunds, defendant
16 would either withhold the batch report from the General Manager or
17 would delete or otherwise manipulate the entries showing unauthorized
18 refunds according to the General Manager. (PSR ¶ 10; GUIU_00443-44.)

19 Third, defendant used her supervisory role to have an employee
20 remove evidence from defendant's office so that the General Manager
21 would not detect defendant's fraud scheme while defendant was on
22 temporary assignment elsewhere. (GUIU_00449.)

23 Fourth, defendant knew through her role as Assistant General
24 Manager that refunds over \$5,000 needed to be approved by the General
25 Manager. Defendant purposely issued refunds under \$5,000 to avoid
26 suspicions of the General Manager. (PSR ¶ 10; GUIU_000450.)

27 Defendant did not stop her years-long embezzlement scheme until
28 she was confronted by the Victim Hotel in 2017. To further cover her

1 scheme, defendant reformatted her two laptops and cell phones before
2 returning them to the Victim Hotel. (PSR ¶ 14.)

3 **III. THE PRESENTENCE INVESTIGATION REPORT CORRECTLY CALCULATES**

4 **DEFENDANT'S OFFENSE LEVEL**

5 The USPO calculated defendant's adjusted offense level as 23
6 using: a base offense level of 7 (USSG § 2B1.1(a)(1)); a twelve-level
7 enhancement for a loss of more than \$250,000 but not more than
8 \$550,000 (USSG § 2B1.1(b)(1)(G)); a two-level sophisticated means
9 enhancement (USSG § 2B1.1(b)(10)(c)); and a two-level abuse of
10 position of trust enhancement (USSG § 3B1.3). (PSR ¶¶ 22-33.) After
11 a three-level reduction for acceptance of responsibility, the USPO
12 calculated defendant's total offense level as 20. (PSR ¶ 36.) The
13 USPO also calculated a criminal history category II. (PSR ¶¶ 43-45.)
14 Based on a total offense level of 20 and a criminal history category
15 of II, the USPO determined that the applicable guidelines range is 37
16 to 46 months' imprisonment (PSR ¶ 88), two to five years' supervised
17 release (PSR ¶ 91), a \$15,000 to \$1,000,000 fine (PSR ¶ 96),
18 \$440,502.31 in restitution (PSR ¶ 98), and a \$100 special assessment
19 (PSR ¶ 95). The government does not object to the PSR's calculations
20 but notes that defendant may now be in Criminal History Category I.
21 The September 2023 PSR correctly added two criminal history points to
22 defendant's score because she committed the instant offense while on
23 supervised probation for embezzlement. (PSR ¶ 44.) The November 1,
24 2023, amendments to the USSG provide for an increase in one criminal
25 history point for committing the instant offense while on probation,
26 but only if defendant receives seven or more criminal history points.
27 USSG § 4A1.1(e) (2023). Thus, it appears that defendant may have one
28 criminal history point and may be in Criminal History Category I.

1 The corresponding guidelines' Range with a total offense level of 20
2 and Criminal History Category I is 33 to 41 months' imprisonment.

3 Defendant was convicted a of bank fraud, a statute that carries
4 a statutory maximum of 30 years' imprisonment. 18 U.S.C. § 1344.

5 Thus, a base offense level of 7 applies. See USSG §2B1.1(a)(1)
6 (baseline offense level of 7 for offense of conviction with statutory
7 maximum term of imprisonment of 20 years or more). Here, the parties
8 agree, and the evidence establishes, that defendant caused at least
9 \$440,502.31 in actual losses. (PSR ¶ 12; Dkt. 3; GUIU_001-009.)
10 Thus, a 12-level enhancement for a loss of more than \$250,000 under
11 USSG § 2B1.1(b)(1)(G) applies.

12 **A. Defendant Abused Her Position of Trust**

13 A two-level "Abuse of Position of Trust" enhancement applies if
14 defendant's position of trust contributed in a significant way to the
15 facilitation of the commission or concealment of the offense. USSG
16 §3B1.3, n.1. Although the government need not show both, the
17 enhancement applies because defendant's position of trust as an
18 Assistant General Manager of the Victim Hotel allowed her to both
19 (1) facilitate her fraud scheme; and (2) conceal her fraud scheme.
20 As noted in the factual basis, PSR, and attached exhibits, defendant
21 had managerial discretion and considerable deference as an Assistant
22 General Manager, including: (1) managed staff accountants and they
23 reported to her; (2) was a Human Resources Manager and had oversight
24 of payroll and accounting; (3) was one of only two people with
25 heightened security to create an employee's user profile; (4) managed
26 night shift auditors; and (5) could process refunds to a customer's
27 credit or debit card for thousands of dollars through a computer
28 without any audit. (PSR ¶¶ 9-11; GUIU_00449-50.)

1 1. Defendant Facilitated the Scheme Through Her Position
2 of Trust

3 Through her position of trust as Assistant General Manager,
4 defendant had the ability to issue refunds to Courtyard Marriott
5 customers using computers at the Courtyard Marriott. Abusing her
6 position of trust, defendant issued more than 100 unauthorized
7 refunds from the Courtyard Marriott's bank accounts to debit cards
8 linked to her First City Credit Union accounts. Thus, defendant's
9 position as Assistant General Manager significantly allowed her to
10 facilitate the fraud scheme, and on this basis alone, the enhancement
11 should apply.

12 2. Defendant Concealed Her Scheme Through Her Position of
13 Trust

14 Separately and alternatively, defendant's role as Assistant
15 General Manager allowed her to conceal her scheme in a significant
16 way. She did this in multiple ways, as described above:

17 First, defendant created a secondary login for another employee
18 using her unique security as Assistant General Manager. Defendant
19 used this employee's secondary login without authorization to issue
20 the fraudulent refunds. The secondary login allowed defendant to
21 conceal her fraud scheme so that the fraud would not be tied to her
22 own login and identity.

23 Second, defendant had managerial authority over staff members
24 and directed staff to provide hard copy batch reports containing
25 financial information directly to her and not to the General Manager.
26 To conceal her embezzlement scheme, defendant would receive the hard
27 copy batch reports and either withhold them from the General Manager
28 or would delete or otherwise manipulate the entries showing
 unauthorized refunds.

1 Third, defendant used her supervisory role to have an employee
2 she supervised remove evidence from defendant's office so that the
3 General Manager would not detect defendant's fraud scheme while
4 defendant was on temporary assignment elsewhere.

5 Fourth, defendant knew through her role as Assistant General
6 Manager that refunds over \$5,000 needed to be approved by the General
7 Manager. Defendant purposely issued refunds under \$5,000 to avoid
8 suspicions of the General Manager.

9 Defendant used her position as Assistant General Manager to
10 conceal her scheme in multiple ways, and the abuse of position of
11 trust enhancement applies. See, e.g., United States v. Christiansen,
12 958 F.2d 285, 288 (9th Cir. 1992) (affirming application of abuse of
13 trust enhancement for manager that embezzled because her position
14 "made it possible for her to conceal the theft for an extended period
15 of time" and provided her access to cash).

16 **B. Defendant Employed Sophisticated Means**

17 Under USSG § 2B1.1(b)(10), defendant intentionally engaged in
18 sophisticated means and a two-level enhancement applies. (PSR ¶¶ 26-
19 27.) Sophisticated means refers to "especially complex or especially
20 intricate offense conduct pertaining to the execution or concealment
21 of an offense." USSG § 2B1.1(b)(10), n.9(B) (emphasis added). As
22 described above in detail, defendant employed especially intricate
23 conduct in concealing her offense: creating and using a secondary
24 login for another employee, directing staff to provide defendant with
25 reports and then doctoring or withholding them, directing a staff
26 member to remove evidence from defendant's office, purposely issuing
27 refunds under \$5,000 to avoid detection, and wiping her work digital
28 devices before returning them to the Victim Hotel. Thus, the

1 sophisticated means enhancement applies. See United States v.
2 Jennings, 711 F.3d 1144, 1145, 1147 (9th Cir. 2013) (affirming
3 application of sophisticated means enhancement for use of bank
4 account with deceptive name and noting “[c]onduct need not involve
5 highly complex schemes or exhibit exceptional brilliance to justify a
6 sophisticated means enhancement.”); United States v. Tanke, 743 F.3d
7 1296, 1307 (9th Cir. 2014) (affirming sophisticated means enhancement
8 for defendant that concealed his embezzlement through creation of
9 false documents).

10 Separately, defendant executed the scheme using sophisticated
11 means which provides an alternative basis for the enhancement to
12 apply. As noted in the Exhibits, defendant took advantage of the
13 Victim Hotel’s rewards reimbursement program and embezzled those
14 funds. (See GUIU_000446.) The Victim Hotel would be reimbursed at a
15 higher rate for rewards stays when the occupancy rate was higher.
16 (*Id.*) Defendant would reimburse her own debit card the full amount
17 the Victim Hotel received from the rewards program while altering the
18 Victim Hotel’s books to make it appear as if they received less from
19 the rewards program, corresponding to a lower occupancy rate. (*Id.*)

20 **IV. THE GOVERNMENT’S RECOMMENDED SENTENCE IS REASONABLE AND**

21 **APPROPRIATE PURSUANT TO THE 3553(A) FACTORS**

22 The government requests that the Court adopt the PSR’s factual
23 findings and guidelines calculations. The government also requests
24 that the Court adopt the government’s sentencing recommendation and
25 sentence defendant to a total of 36 months’ imprisonment, three
26 years’ supervised release, and order that defendant pay \$440,502.31
27 in restitution and the mandatory \$100 special assessment.

1 The recommended sentence, is appropriate given the 3553(a)
2 factors, including the nature and circumstances of the offense,
3 history and characteristics of defendant, and the need to afford
4 adequate deterrence for criminal conduct. These factors weigh in
5 favor of a sentence of 36 months' imprisonment.

6 **A. Probation is Not Available for Defendant's Offense**

7 As noted in the PSR, defendant was convicted of a Class B felony
8 and probation is not an available sentence by statute. (PSR ¶ 92;
9 see also 18 U.S.C. § 3561(a)(1).) Further, because the applicable
10 guidelines' range is in Zone D, defendant is ineligible for
11 Probation. (PSR ¶ 93.)

12 **B. Nature and Circumstances of the Offense**

13 Defendant executed a long-running scheme to embezzle hundreds of
14 thousands of dollars from the Victim Hotel by abusing her position of
15 authority. This was not a momentary lapse in judgment. Instead,
16 defendant embezzled from the Victim Hotel more than 100 times over a
17 period of about eight years. Defendant actively concealed her
18 embezzlement by taking steps such as creating a fake login with
19 another employee's identifying information and falsifying reports.
20 Defendant did not stop until she was caught. Further, defendant
21 erased company laptops and phones to further conceal her offense.
22 Defendant's conduct was undoubtedly serious, took a toll on the
23 Victim Hotel, and warrants a serious custodial sentence. As noted in
24 the under-seal victim-impact statement, defendant caused an employee
25 of the hotel enormous "anxiety and emotional turmoil" through her
26 embezzlement scheme. Defendant further cost the Victim Hotel: it had
27 to have its employees spend long hours reviewing defendant's theft
28 and pay an outside firm to audit the embezzlement.

C. History and Characteristics of Defendant and Need for Deterrence

3 Defendant caught a break and only served one month in custody
4 for a 10-year sentence for her four felony embezzlement convictions.
5 Rather than learn from her prior crimes, defendant seemed emboldened
6 and engaged in a larger scale, approximate eight-year embezzlement
7 scheme while she was on supervised probation. Defendant's actions
8 show a lack of respect for the law. A significant period of
9 incarceration is warranted because a one-month custodial sentence did
10 not deter defendant from committing the instant offense.

11 In mitigation, defendant is educated and reports suffering from
12 an abusive former partner. Defendant attended private elementary
13 school, graduated from high school, and obtained her associate's
14 degree. (PSR ¶¶ 65-66.) Defendant appears to have professional
15 skills and be capable of maintaining employment. Defendant, however,
16 chose to use her skills to embezzle rather than advance the interests
17 of her employers. The mitigating factors point towards a sentence
18 away from the high-end of the guidelines' range despite defendant's
19 lack of respect for the law.

20 | V. CONCLUSION

21 For the foregoing reasons, the government submits that its
22 recommended sentence is sufficient, but not greater than necessary,
23 given the history and characteristics of defendant and the nature and
24 circumstances of the offense. Accordingly, the government requests
25 that the Court sentence to 36 months' imprisonment, three years'
26 supervised release, and order that defendant pay \$440,502.31 in
27 restitution and the mandatory \$100 special assessment.